

[WILSON, P., ZEKIA, VASSILIADES and JOSEPHIDES, JJ.]

LYDA A. PHOTIADES,

Appellant-Plaintiff,

v.

CHRYSTALLA X. IOANNIDES,

Respondent-Defendant.

(Civil Appeal No. 4337).

1962
April 6
LYDA A.
PHOTIADES
v.
CHRYSTALLA
X IOANNIDES

Immovable property—Common Wall—Ouster—Rights of co-owners to common wall—Either co-owner may use wall provided this does not oust from possession the other party—Rights may be acquired by prescription or agreement

This was an action by appellant - plaintiff to recover damages for trespass and/or nuisance due to the erection of a house by the respondent - defendant touching plaintiff's house at Larnaca, and also for the use of the wall by the respondent - defendant in a way injurious to the appellant - plaintiff who also claimed other consequential relief. It was common ground that the wall was common

Held . (1) Since the parties are co-owners of the wall, both parties are entitled to use the wall provided that such user does not oust the possession of the other party nor destroy or threaten to destroy the walls

(2) The window which the respondent put in the wall and of which the appellant complains does not amount to either ouster or destruction. The trial Court was therefore right in holding that the window does not give the appellant a cause of action. (Principles laid down in *Costas Xenophontos v. Hagop Kazandjian* (1953) 19 CLR 219, at p 220, applied. *Watson v Gray* (1880) 14 Ch 192, distinguished

(3) In this case the plaintiff-appellant built three fanlight windows on the common wall, but he may not prevent the use of the wall by the defendant-respondent unless he has acquired such a right either by agreement or by prescription. On the evidence he has acquired no such right.

(4) But the appellant-plaintiff seeks to go further namely to prevent the defendant-respondent from building an adjoining wall close to the common wall. No authority, except *Watson*

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v. Gray (*supra*), was cited in support. But this authority has no such effect.

Appeal dismissed.

Cases referred to :

Costas Xenophontos v. Hagop Kazandjian (1953) 19 C.L.R. 219 ;

Watson v. Gray (1880) 14 Ch. 192.

Appeal.

Appeal against the judgment of the District Court of Larnaca (A. Attalides P.D.C. and Y. Ch. Malachtos D.J.) dated 11/3/61 (Action No. 1537/60) dismissing plaintiff's claim for damages for trespass on the plaintiff's house situated at Skala and for nuisance due to the erection of a house by the defendant touching it, and the use of the wall by the defendant in a way injurious to the plaintiff who also claimed other consequential relief.

Chr. P. Mitsides for the appellant.

G. P. Cacoyannis for the respondent.

The judgment of Court was delivered by :—

WILSON, P. : We do not think that it is necessary to call upon counsel for the respondent-defendant in this appeal.

This is an appeal from the judgment of the District Court of Larnaca on March 11th, 1962, dismissing the plaintiff's claim with costs for one advocate only. The Court also ordered and adjudged that the separating wall of the properties is a common wall and dismissed the defendant's counterclaim without costs. There is no cross-appeal on the counterclaim.

The action is to recover damages for trespass on the plaintiff's house Reg. No. F. 450 of 30.4.58 at locality "Phaneromeni Street No. 49" situated at Skala and/or nuisance due to the erection of a house by the defendant touching it, and the use of the wall by the defendant in a way injurious to the plaintiff who also claimed other consequential relief.

The trial court found, and it was admitted on appeal, that the wall is a common wall. The issues then resolved

into whether or not one of the incidents of its ownership vested in plaintiff a right to build at any time and to maintain windows with fanlights, apart from any right which may be acquired by prescription. It was argued that the case of *Watson v. Gray* (1880) 14 Ch. D. 192, was an authority for this contention. We are unable to agree.

It is our opinion that this case comes squarely within that case as interpreted in *Costas Xenophontos v. Hagop Kazandjian* (1953) 19 C.L.R. 219. At p. 220 it is quoted :—

“Now since the parties are co-owners of the wall, both parties are entitled to use the wall provided that such user does not oust the possession of the other party nor destroy or threaten to destroy the walls.

The window which the respondent put in the wall and of which the appellant complains does not amount to either ouster or destruction.

The trial Court was therefore right in holding that the window does not give the appellant a cause of action.

If the appellant wishes to use that part of the wall and the respondent has not acquired a right to the window's light by agreement or by prescription, the appellant may build up the wall where the window has been made”.

In this case the plaintiff built these three fanlight windows, but he may not use them to prevent the use of the wall by the respondent unless he has acquired such a right either by agreement or by prescription. Upon the evidence he has not done so and his claim must fail.

But he seeks to go further, namely to prevent the respondent from building an adjoining wall close to this common wall. His counsel was unable to cite any authority, except *Watson v. Gray* in support of this contention. In our opinion this does not have the effect and this argument fails.

For the reasons I have given, the appeal will be dismissed, with costs.

Appeal dismissed.

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